

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Closed Captioning and Video)
Description of Video Programming)
)
Implementation of Section 305 of)
the Telecommunications Act of 1996)
)
Video Programming Accessibility)

MM Docket No. 95-176

COMMENTS OF PRIMESTAR PARTNERS L.P.

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COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR Partners L.P. ("PRIMESTAR") hereby submits its comments in response to the Notice of Proposed Rulemaking ("Notice"), released in the above-captioned proceeding on January 17, 1997.¹ The Commission's Notice seeks comment on proposed rules and implementation schedules for captioning of video programming, as required by Section 305 of the Telecommunications Act of 1996 ("1996 Act").²

I. STATEMENT OF INTEREST AND SUMMARY

PRIMESTAR provides direct-to-home ("DTH") satellite television service using a medium power fixed satellite operating in the Ku-band. PRIMESTAR currently offers 95

¹ FCC 97-4, released January 17, 1997.

² Pub.L. 104-104, 110 Stat. 56 (1996).

channels of entertainment and informational programming, including hit movies, regional sports networks, breaking international and national news, family programming, home shopping, pay-per-view and digital music channels to approximately 1.7 million subscribers.

DTH providers including PRIMESTAR operate almost exclusively as program delivery systems. DTH operators do not select each program they air, but receive a full complement of programs from a multitude of networks, many of which operate twenty-four hours per day. Moreover, DTH providers do not have the ability to receive the programming signals of the networks in advance of transmission of the signals to their subscribers.

Because of the DTH method of operation, DTH operators have not participated generally in the closed captioning of video programming. PRIMESTAR and presumably other DTH operators do, however, retransmit intact the closed captioning already encoded in the programming they deliver to their subscribers.

As described more fully below, PRIMESTAR submits that the Commission should: (1) reconsider its proposal not to place responsibility for compliance with the closed captioning requirements at the production stage; (2) phase-in captioning of new programming over a ten-year period with a maximum captioning requirement that is less than 100%; (3) refrain from adopting quantitative benchmarks for captioning of library programming; (4) adopt appropriate exemptions to its

closed captioning rules; and (5) grandfather certain existing affiliation and program license agreements.

II. RESPONSIBILITY FOR CAPTIONING

PRIMESTAR agrees with the Commission's assertion that "from a practical standpoint, captioning at the production stage is often the most efficient manner to include closed captioning with video programming." Notice at 18. Similarly, Congress recognized that "[i]t is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."³

Despite the recognition that captioning is best done at the production level, the Commission suggests that "program providers are in the best position to ensure that the programming they distribute is closed captioned because of their role in the purchasing of programming from producers." Notice at 18. PRIMESTAR disagrees. In fact, the producers or distributors have the greater incentive and ability to carry out the responsibilities for captioning.

DTH service providers do not have the technical capability to produce closed captioning for the programming that they retransmit. The mechanics of transmission and the technical configuration of the systems themselves make it

³ H.R. Report 104-204, 104th Cong., 1st Sess. (1995) at 114.

virtually impossible for the captioning to be added after the programming has either been created or prepared for television viewing by the producer or distributor.

As further discussed below, pre-existing program license and/or affiliation agreements between networks and DTH service providers for the most part do not obligate the networks or their program producers to include any amount of closed captioning. Many of these license or affiliation agreements run for several years. It is not reasonable to assume, as does the Commission, that DTH providers such as PRIMESTAR have sufficient leverage to renegotiate these arrangements to impose captioning obligations on these networks or producers. For all of these reasons, PRIMESTAR submits that it would be more appropriate for program producers/networks to be responsible for compliance with the closed captioning regulations.

Should the Commission determine, however, that responsibility for compliance with its closed captioning rules should lie with MVPDs, PRIMESTAR submits that it should concurrently adopt a mechanism through which MVPDs would be isolated from the consequences of failure to comply with the closed captioning rules provided they can show they have made a good faith effort to ensure that the programming they distribute is captioned, and that they have transmitted available captioning intact. In no event should MVPDs be required to renegotiate their affiliation agreements prior to the end of their respective terms.

III. TRANSITION RULES FOR NON-EXEMPT NEW PROGRAMMING

A. Captioning Of Non-Exempt New Programming Should Be Phased In Over A Ten Year Period

PRIMESTAR supports the Commission's proposal to phase-in its captioning requirements for non-exempt new programming over a period of time, with the amount of required captioning increasing incrementally. PRIMESTAR believes that the Commission's ten year implementation schedule is preferable to the eight year alternative. A slightly longer transition period will ensure that program owners, producers, and distributors have sufficient time to formulate appropriate business plans, implement procedures and allocate resources to assume their additional responsibilities most efficiently. In addition, a ten year period will afford the closed captioning industry adequate time to grow in response to the increased demand.

B. The Maximum Percentage of Non-Exempt New Programming That Must Be Captioned Under the Rules Should Be Less Than 100 Percent

As described below, PRIMESTAR believes that there are certain specific categories of programming, such as interstitial material and live programming, for which the Commission's closed captioning rules should provide specific exemptions. These specific exemptions, however, will not cover the myriad circumstances under which it may be in the public interest for an uncaptioned program to be aired. Where the economic burden of captioning a particular program is

great relative to the size of its audience or the length of its usefulness, or insufficient time is allowed for captioning a scheduled program, programmers or distributors would be forced to seek a waiver of the Commission's rules in order to include such programs in their schedules.

PRIMESTAR submits that it would be far more efficient and less cumbersome for both programmers and the Commission if, rather than requiring individual petitions for waiver in each of these circumstances, the Commission were to set its captioning maximum for new, non-exempt programming at a figure below one hundred percent. The general exemption that effectively would be created as a result would alleviate some of the need for filing waiver requests, and afford programmers the discretion to air limited amounts of uncaptioned new programming.

**C. MVPDs Should Be Permitted To Elect
Whether They Will Base Compliance
On A Per-Channel Or System-Wide Basis**

Should the Commission adopt its proposal to place responsibility for meeting closed captioning requirements on MVPDs, the Commission proposes two alternatives as to how the percentages of programming that must be captioned will be applied. PRIMESTAR submits that each alternative has merit, and that an MVPD should be afforded the flexibility to elect either option.

The first alternative is to apply the percentages on a system-wide basis. This approach is not only logical, given that the Commission has proposed that MVPDs ultimately be held

responsible for compliance with the closed captioning rules, but also promotes the public interest in diversity of programming by affording MVPDs a great degree of flexibility in determining which program networks they will carry.

Based on the initial 25% benchmark for closed captioning of non-exempt new programming, for example, if PRIMESTAR elected to be judged on the amount of captioning it provided system-wide, it might choose to transmit one network whose programming is completely captioned, thus leaving it the option to affiliate with three others that might be able to offer little or no captioning. In other words, the application of percentages on a system-wide basis would allow MVPDs to continue to or begin to carry networks which, for whatever reason, are not able to attain the required closed captioning percentages individually. Depending upon the nature of the exemptions and/or requirements for library programming that the Commission ultimately adopts, classic movie channels or fledgling networks stand to benefit significantly from this approach. Thus, system-wide application would serve to preserve program diversity through carriage of networks for which closed captioning is impractical or infeasible.

Applying percentages on a per-channel basis, however, also would work to serve the public interest. Some MVPDs might be better served by this approach, as it would relieve them of the burden of assessing system-wide compliance, and allow the MVPDs to rely on each of their networks to certify

as to compliance. Offering MVPDs the option to choose this approach would provide them with additional flexibility to assemble program packages and tailor closed captioning arrangements to suit their needs.

Finally, regardless of which entities are responsible for captions, the determination that a percentage requirement has been met should be based on the amount of programming that is aired annually.⁴ An annual assessment would afford programmers and/or MVPDs sufficient flexibility to schedule more or less captioned programming in particular weeks or months than in others, and alleviate some of the reporting and/or record keeping burdens. Certain networks, for example, might interrupt regularly scheduled programming to carry live, breaking news, or another important live event, perhaps for an extended period of time. As a result, an assessment based on programming aired during a single week, for example, might not be representative of overall captioning efforts. An annual assessment would reflect more appropriately the general level of accessibility to video programming for the hearing impaired offered by the network or MVPD.

⁴ Presumably, no assessment would be made prior to the Commission's initial two-year benchmark.

**IV. CAPTIONING RULES MUST BE CRAFTED SO AS NOT
TO IMPEDE THE DEVELOPMENT OF NEW TECHNOLOGY**

PRIMESTAR agrees that digital technology may result in a variety of means through which closed captioning can be provided. Any rules adopted by the Commission should foster, not impede, the development of new technologies. PRIMESTAR recommends, therefore, that the Commission's rules should be flexible enough to allow for the provision of closed captioning through any available means, provided it results in a textual display of dialogue, and does not impose significant additional costs on consumers.

V. TRANSITION RULES FOR NON-EXEMPT LIBRARY PROGRAMMING

As the Commission recognizes, an enormous amount of older programming exists, including classic movies and television series, as well as current-run, uncaptioned programming. By virtue of the sheer volume of uncaptioned library programming, a mandatory captioning requirement would be extremely difficult, if not impossible, to implement. Rather than captioning library product, providers simply would elect to remove older, uncaptioned programming from their scheduled offerings, thus reducing the amount and variety of programming options available to all viewers. Such a requirement would have an exaggerated impact on program networks that rely primarily on previously published material, such as Turner Classic Movies and American Movie Classics. PRIMESTAR submits

that the Commission must craft its rules to avoid these adverse results.

Specifically, PRIMESTAR recommends that the Commission adopt no percentage benchmarks or time deadlines for the captioning of library programming. Specific requirements are unnecessary given the natural workings of the marketplace. As program owners or producers caption "new" programming in response to the Commission's closed captioning directives, the amount of video programming accessible to the hearing impaired will increase. Moreover, as this "new" captioned programming ages and becomes library product, and as additional "new" captioned titles are added to programming schedules, the overall percentages of captioned programming will increase to an even greater extent.

If consumer demand for the captioning of previously published programs exists, programmers will respond to that demand. Program producers and distributors should be allowed to do so, however, in accordance with the dictates of the marketplace and not pursuant to artificial deadlines. To prescribe otherwise would ensure that some older programming would become unavailable to all viewers, regardless of its desirability.

VI. EXEMPTIONS

A. Interstitial and Textual Material Should Be Exempt From Captioning Requirements

PRIMESTAR concurs with the Commission's tentative conclusion that its rules should include a general exemption from the closed captioning requirements for interstitial material. Interstitial material is primarily promotional in nature, and the salient information contained therein is almost always visually displayed through text or graphics. Further, details concerning scheduled airtimes and program descriptions also are available through alternative sources, such as newspaper television listings or program guides. Thus, a wealth of sources of most of the information contained in the audio portion of interstitial material is available to the hearing impaired community.

While the benefits of captioning interstitial material would be negligible, the burden of captioning these promotional announcements would be great. Large numbers of interstitials are produced on a tight schedule, and their shelf life is generally no more than a week. Moreover, interstitials are usually produced by networks or distributors in-house, and captioning would require in-house captioning personnel. Given the nature of interstitials, a mandatory captioning requirement for these segments would increase costs exponentially, creating an undue burden for programmers.

Similarly, material that is primarily textual in nature, such as on-screen program schedules or guides, should be

exempt. Again, the audio track for this "programming" is of little relevance and the text is sufficient to afford access for the hearing impaired. PRIMESTAR recommends, therefore, that interstitial and textual material be exempt from the Commission's closed captioning requirements.

B. DBS Noncommercial Programming Should Be Exempt From Captioning Requirements

To the extent that the Commission determines that it will impose upon DBS providers an obligation to devote a portion of their capacity to noncommercial programming,⁵ PRIMESTAR submits that such programming should be exempt from the Commission's closed captioning requirements. The programming provided by noncommercial entities may not be captioned for cost-saving reasons. Because an obligation to carry such programming may be imposed on DBS operators, the operators should not be faulted if the programming is produced without captions.

C. Live Sports and Music Programming Should Be Exempt From Captioning Requirements

The technical and logistical problems associated with captioning live sporting events compels that this class of programming generally be exempt from the Commission's closed captioning requirements. First, the Commission has acknowledged that captioners skilled enough to provide captioning of live programming are scarce. Given that

⁵ Notice of Proposed Rulemaking in MM Docket No. 93-25, 8 FCC Rcd. 1589 (1993).

sporting events are primarily visual, and that updates or statistics designed to enhance the viewer's comprehension of such an event usually are provided graphically, to allocate limited captioning resources to these events would be to squander them. Moreover, as the record in this proceeding indicates, live sports programming is perishable, generally having no residual market, so that production costs may not be spread out over multiple showings.

Similarly, the Commission should exempt live musical performances from its closed captioning requirements. While not as perishable as sports programming, the captioning of such live programming is difficult and the available captioning resources are limited. PRIMESTAR finds reasonable the Commission's suggestion that such programming could be captioned when rebroadcast.

**D. Weather Programming Should Be Exempt
From Captioning Requirements**

PRIMESTAR disagrees with the Commission's tentative proposal not to include weather programming in its general exemption. PRIMESTAR does not dispute the fact that weather conditions can and often do directly affect health and safety concerns. However, the pertinent information contained in almost all weather reports is conveyed through maps, text or graphics, and emergency information is often repeated using "crawlers," eliminating the need for a captioning requirement.

**E. Audio Channels Should Be Exempt
From Captioning Requirements**

PRIMESTAR currently carries 14 digital audio channels as part of its DTH service offerings. Usually, a static picture, rather than a blank screen, appears on the channels dedicated to audio services. The cost of closed captioning would most certainly result in the elimination of these digital audio music channels, which are more akin to radio than television services. These channels should be exempt from the Commission's closed captioning requirements.

**F. Commercials Should Be Exempt
From Captioning Requirements**

Many advertisers already caption their commercials. Certainly, there is every incentive for them to do so provided the costs are not prohibitive. Given this incentive, the Commission should not mandate captioning for advertising. To the extent the Commission does impose any captioning obligations, they should fall on the advertiser and not on the distribution outlet showing the commercial. To impose captioning obligations on each outlet would result in multiple inefficiencies.

VII. EXISTING CONTRACTS

Congress has directed the Commission to exempt existing contracts that are "inconsistent with" captioning. PRIMESTAR believes that existing contracts raise important issues that must be addressed by the Commission's rules.

First, existing affiliation agreements generally do not contain provisions with respect to compliance with the closed captioning rules. Renegotiating such contracts would impose significant burdens both on networks and distributors.

PRIMESTAR submits then, that should the Commission hold MVPDs responsible for compliance with its closed captioning rules, existing affiliation agreements should be grandfathered.

Existing program license agreements also do not generally assign responsibility for closed captioning and the costs of closed captioning are not reflected in the license fees. Where captioning obligations have not been placed contractually on the producer, programs may not be captioned. It would be inequitable for the MVPD to assume the cost and responsibility for captioning these programs without having the opportunity to negotiate for the benefit of the bargain with the producer. These existing program license agreements, therefore, also should be grandfathered.

**VIII. THE COMMISSION SHOULD REFRAIN FROM IMPOSING
NON-TECHNICAL STANDARDS FOR QUALITY AND ACCURACY**

PRIMESTAR submits that as demand for and competition among closed captioning providers increases, the quality and accuracy of closed captions will improve. The marketplace will not tolerate closed captioning that fails to meet acceptable standards. Therefore, there is no need for the Commission to impose non-technical requirements for quality and accuracy.

As the Commission points out, individuals entering the closed captioning industry must be professionally certified, and the Department of Education has developed guidelines for evaluation and quality control assessment. Imposing additional requirements would put captioning out of reach for some producers, thus diminishing the diversity of programming available.

IX. ENFORCEMENT AND COMPLIANCE REVIEW

PRIMESTAR agrees that closed captioning requirements should be enforced through the existing types of complaint processes. In this regard, PRIMESTAR supports the Commission's proposal to require the complaining party to notify the party responsible for compliance with the captioning rules of any complaint. In this manner, the parties would be afforded the opportunity to resolve the complaint initially themselves, minimizing the administrative burden on the parties involved in the process, as well as the Commission.

Should the Commission determine that MVPDs will be held ultimately responsible for compliance with the rules, the Commission should clarify that operators may rely on certifications from programmers as to the percentages of programming their respective services caption. Given that MVPDs such as PRIMESTAR have no control over what programming is carried by their networks and do not receive this programming in advance of its transmission, if a good faith


effort has been made by the MVPD to comply with the Commission's rules, but a network, for example, fails to provide captioning in conformity with FCC guidelines, the Commission should afford MVPDs the opportunity to make such a showing and absolve themselves of the consequences of a failure to comply with the rules.

X. CONCLUSION

For the foregoing reasons, the Commission should modify its proposed closed captioning rules to conform to the suggestions stated herein.

Respectfully submitted,

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